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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

BILLY JACK BELCHER,

Defendant and Appellant.

F038786

(Super. Ct. No. 37752)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

Geri Lynn Green, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, John G. McLean and Stan Cross, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Vartabedian, Acting P.J., Harris, J., and Buckley, J.

A jury convicted appellant Billy Jack Belcher of two counts of forcible rape (Pen. Code, § 261, subd. (a)(2);¹ counts 1, 2) and one count of forcible oral copulation (§ 288a, subd. (c); count 3), and found true allegations that in committing each offense appellant engaged in the tying and binding of the victim (§ 667.61, subds. (b), (e)(6)). The court sentenced appellant to 15 years to life on each count, with the sentence on count 3 imposed consecutively to that imposed on count 1, and execution of sentence on count 2 stayed pursuant to section 654. Belcher appealed, and this court reversed and remanded for resentencing on counts 2 and 3.² On resentencing, the court imposed the eight-year upper term on count 3; a concurrent six-year midterm on count 2; and, on count 1, a term of fifteen years to life, to run consecutively to the determinate terms imposed on counts 2 and 3. A second appeal followed.

In the instant appeal, appellant challenges the imposition of consecutive sentences on substantive and procedural grounds and argues that the sentence imposed was unconstitutionally cruel and unusual. He also argues that if his challenge to the imposition of consecutive sentences is deemed waived by counsel's failure to object to the sentence when it was imposed, such failure deprived appellant of his constitutional right to the effective assistance of counsel. The People concede appellant's contention that the court did not adequately explain its decision to impose consecutive sentences. We will vacate the sentence, remand for resentencing and in all other respects affirm.

¹ Except as otherwise indicated, all further statutory references are to the Penal Code.

² We grant appellant's unopposed request to take judicial notice of the record on appeal in his previous appeal, *People v. Belcher* F027501. (Evid. Code, §§ 452, subd. (d); 459, subd. (a).) We also take judicial notice of this court's opinion in that case. (*Ibid.*)

FACTUAL AND PROCEDURAL BACKGROUND

Facts³

Appellant and Debbie D. were acquainted but had never had a romantic relationship when, on the evening of May 2, 1996, they met at a bar.⁴ Later, Debbie asked appellant for a ride home, and the two left the bar in appellant's van; appellant drove. He parked by the side of a canal, where the two talked for a while. Later, appellant drove to a more secluded spot and parked.

At one point while the van was parked at the second location, appellant, who had gotten out of the van, reached back in, grabbed Debbie, pulled her out of the van, threw her face-down onto the ground and got on top of her. Debbie screamed. Appellant told her to be quiet; "everything was going to be all right"; and "[h]e had to do what he had to do." Then appellant put Debbie's hands behind her back; tied them with what Debbie thought was a bandanna; picked Debbie up; walked her to the van's sliding door; and told her to get in. Debbie complied.

Inside the van, appellant tied Debbie's hands tighter with what felt like a piece of rubber. He calmed down; told Debbie, " 'Let me do what I got a do[]' "; and untied her. Next he undressed and began undressing Debbie. Debbie did not resist because she was "very scared."

After Debbie's pants were off, appellant, who was facing Debbie, licked her vagina for approximately 30 seconds to one minute. Next, still facing Debbie, appellant put his penis in her vagina. After approximately one or two minutes he "took it out and turned [Debbie] around." Then he put his penis in Debbie's vagina again. After approximately one or two minutes he removed his penis. Appellant and Debbie each

³ Because appellant does not challenge the sufficiency of the evidence, we set forth the facts in the light most favorable to the judgment.

⁴ The factual statement is taken from Debbie's testimony.

dressed a few moments later, after which appellant drove “into town.” At first, appellant followed Debbie’s directions to her home, but eventually he told her he could not go “any further in town[,]” stopped and let Debbie out of the car.

Procedural Background

On appellant’s first appeal, this court held section 667.61 authorized the imposition of a life sentence on count 1 only and that the trial court erred in imposing life terms on counts 2 and 3.⁵ We remanded for resentencing and directed the court to (1) choose between the mitigated, aggravated or middle term for each of counts 2 and 3, and (2) “decide if the sentences [for those two offenses] should be fully consecutive to the count [1] life sentence under the provisions of section 667.6, subdivision (c) or (d).”⁶ We further stated that in making the latter determination, the trial court should be guided by this court’s opinion in *People v. Irvin* (1996) 43 Cal.App.4th 1063.

At the subsequent resentencing, after imposing the aggravated eight-year term on count 3, the court stated, “As to Count 2, whether that should run concurrently or consecutively, the Court is finding that those two counts should run concurrently. The Court does not feel there’s sufficient time for reflection between those two acts so that consecutive sentences should apply as to Counts 2 and 3.” The court then imposed the six-year midterm on count 2 and the fifteen-years-to-life term on count 1 (§ 667.61), and

⁵ Section 667.61, commonly known as the “One Strike” law (*People v. Rayford* (1994) 9 Cal.4th 1, 8), mandates an indeterminate life term for any person who, among other things, commits a forcible rape or an act of forcible oral copulation and “engage[s] in the tying or binding of the victim . . . in the commission of the . . . offense” (§ 667.61, subd. (e)(6)), subject to the following limitation: “[t]he [indeterminate life] term specified [in the statute] shall be imposed once for any offense or offenses committed against a single victim during a single occasion” (§ 667.61, subd. (g)).

⁶ At trial, the prosecution told the jury in closing argument that the rape that occurred first (the face-to-face rape) was charged in count 1, and the second-in-time rape was charged in count 2. Accordingly, we conclude the jury’s verdicts on counts 1 and 2 referred to the first-in-time rape and the second rape, respectively.

stated, “[the count 1 term] is to run consecutive to the determinate terms because the Court does feel that there was sufficient time and reasonable opportunity for the defendant to reflect upon his actions, and it was [a] separate occasion from Counts 2 and 3.”

DISCUSSION

Appellant contends the court failed to explain adequately its reasons for imposing full consecutive sentences under section 667.6, subdivision (d). The People agree. We will remand for resentencing.

Section 667.6, subdivision (d) mandates full consecutive sentences for certain sex offenses, including forcible rape and forcible oral copulation, if committed against the same victim on “separate occasions.” And, the statute states, “[i]n determining whether crimes against a single victim were committed on separate occasions . . . , the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions.” (§ 667.6, subd. (d).)

In *People v. Irvin*, *supra*, 43 Cal.App.4th 1063, after concluding the court’s statement of reasons for imposing full consecutive terms was inadequate because it “[did] not provide a sufficient analysis of the facts to allow this court to determine why it concluded all 20 sex offense acts must have occurred on ‘separate occasions[,]’ ” we offered guidelines to assist the court at resentencing. After reviewing the case law on what constitutes “separate occasions” within the meaning of subdivision (d) of section 667, we stated, “[i]f a court concludes such a finding[,] [i.e., that the defendant committed the sex crimes in question against a single victim on “separate occasions”] is appropriate, it must clearly explain its reasoning based upon a dispassionate review of the

facts.” (*Id.* at p. 1071.). Further, we stated, “[u]pon remand, if the court decides to resentence defendant under [section 667][,] subdivision (d), it must give a factual explanation supporting its finding of ‘separate occasions’ for each count sentenced under that subdivision. An overall statement of the court’s general impression of the evidence is insufficient. [¶] If the court decides to sentence pursuant to section 667.6, subdivision (c), and impose full, separate and consecutive terms for the sex offense counts that it determines did not occur on a separate occasion, it must also provide a statement of reasons for this sentencing choice.”⁷ (*Id.* at p. 1072.)

In the instant case, as indicated above, the court stated its *conclusion* that “there was sufficient time and reasonable opportunity for the defendant to reflect upon his actions” between committing the count 1 offense and the count 2 and 3 offenses and that therefore count 1 “was a separate occasion from Counts 2 and 3.” However, as appellant contends and the People concede, this statement did not contain an analysis/review of the facts and an explanation, based on the facts, of the reasoning behind the court’s finding of “separate occasion[s].”

Accordingly, we will remand for resentencing. (*People v. Irvin, supra*, 43 Cal.App.4th at p. 1070.) A sentence of 15 years to life is to be imposed on one of the three convictions, pursuant to section 667.61, and the sentences on the two remaining offenses are to be imposed pursuant to the relevant code violations. For example, if the court chooses to impose the 15-years-to-life term on count 1 (§ 261, subd. (a)(2)) it must sentence on the remaining offenses utilizing the sentencing triad applicable to counts 2 (§ 261, subd. (a)(2)) and 3 (§ 288a, subd. (a)(2)), respectively. As it did below,

⁷ Section 667.6, subdivision (c) provides that a court may, in its discretion, impose full-term consecutive sentences for certain sex crimes, including forcible rape and forcible oral copulation, “whether or not the crimes were committed during a single transaction.”

as to each of the remaining counts, the court must choose between the mitigated, aggravated or middle term. Next, the court must decide if any of the terms imposed should be fully consecutive under the provisions of section 667.6, subdivision (c) or (d). In making this decision, the trial court should be guided by this court's opinion in *People v. Irvin, supra*, 43 Cal.App.4th 1063, in particular this court's discussion of what constitutes "separate occasions" within the meaning of section 667.6, subdivision (d). (*Id.* at pp. 1070-1071.) If the trial court determines that two of the convictions, or all three convictions, involved separate occasions, as that term is defined under section 667.6, subdivision (d) and case law, then a full consecutive sentence must be imposed for each separate occasion, and the court must give an adequate factual explanation for its decision to impose sentence under section 667.6, subdivision (d). If the court determines that none of the convictions involved separate occasions, or that only two of the convictions involved separate occasions, then as to those convictions that did not involve separate occasions the court must exercise its discretion and determine if full consecutive sentences should be imposed under section 667.6, subdivision (c). If the court imposes one or more discretionary full consecutive terms, the court must provide a statement of reasons for this sentencing choice, and sentence in accordance with *People v. Hicks* (1993) 6 Cal.4th 784, which clearly establishes that section 654 does not preclude imposition of full consecutive sentences under section 667, subdivision (c) for separate acts committed during an indivisible course of conduct.

The court should also make clear that count 1 refers to the rape that occurred first in time (the face-to-face rape); count 2 refers to the rape that occurred second in time; and the count 3 refers to the forcible oral copulation.⁸

⁸ At the resentencing, there was no discussion as to which rape was charged in count 1 and which was charged in count 2. As indicated above, the court found the count 2 rape and the act of oral copulation (count 3) were not "separate occasions[.]" even

DISPOSITION

The judgment of convictions is affirmed. The sentence is vacated. The case is remanded for resentencing, and the trial court is directed to impose sentence of 15 years to life on one of appellant's convictions and to impose sentence on the remaining counts in accordance with the views set forth in this opinion.⁹

though the count 1 rape, i.e., the rape which occurred first in time, intervened between the two acts, yet also found the count 1 rape, which occurred after the count 3 offense but before the count 2 rape, was a "separate occasion" from counts 2 and 3. The foregoing suggests the trial court may have inadvertently referred to count 1 as count 2, and vice versa.

⁹ Because we remand for resentencing we do not address appellant's contentions that (1) the evidence was insufficient to support a finding that the act of oral copulation was a separate occasion as to either of the rapes; (2) the sentence imposed on resentencing violated the constitutional proscription against cruel and unusual punishment; and (3) appellant was denied his constitutional right to the effective assistance of counsel.